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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1984

EUGENE MASTROPIERI,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented

1. Whether Fed. R. Crim. P. 6(e) (4) permits the sealing of an indictment in circumstances where secrecy is not needed to secure custody over one or more defendants?

List of the Parties

Apart from the party named in the caption of this petition, the other parties involved in the trial were the Southland Corporation and S. Richmond Dole.

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The petitioner, Eugene Mastropieri, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming the judgment of conviction entered against the petitioner by the United States District Court for the Eastern District of New York (Sifton, J.).

Opinions Below

The opinion of the Court of Appeals appears in the appendix hereto at pp. 1a-32a. The opinion of the United States District Court for the Eastern District of New York appears in the appendix at pp. 33a-41a.

Jurisdiction

The date of the judgment of the United States Court of Appeals was April 23, 1985. This Court's jurisdiction is invoked under Title 28, United States Code § 1254(1).

Statutory Provision Involved in This Case

Federal Rule of Criminal Procedure, Rule 6(e) (4):

> The federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

Statement of the Case

Eugene Mastropieri stands convicted of conspiring, along with Southland Corporation, S. Richmond Dole, and others known and unknown to the grand jury, (1) to violate the Travel Act (18 U.S.C. § 1952) and (2) to defraud the United States by impeding the Internal Revenue Service's collection of 1977 income taxes from the Southland Corporation. The Travel Act conspiracy involved an alleged plan to bribe an unidentified New York State tax official in connection with Southland's sales tax difficulties in that state. Yet the evidence at trial showed (1) that there was never any bribe paid; (2) that Mastropieri, then a lawyer, provided legitimate legal services to Southland in connection with its sales tax problem; (3) that the word bribe was never used by any of the alleged co-conspirators until the government began investigating this affair years after the events at issue here occurred; and (4) that Mastropieri never received any compensation from this supposed scheme. As for the other alleged object of the conspiracy (defrauding the United States), a conviction was obtained despite

the fact that Eugene DeFalco, the cooperating co-conspirator with whom Mastropieri allegedly entered into the conspiracy, testified unequivocably that his conspiratorial agreement with Mastropieri did not encompass tax evasion.

The Government's Proof At Trial

A. The Evidence Directly Involving Mastropieri

The government's principal witness was Eugene DeFalco, a former vice-president of the Southland Corporation who had been indicted in this case and then decided to cooperate with the government. In 1976, DeFalco became manager of Southland's Northeast Division. At that time, Southland was involved in a dispute with the New York State Tax Commission regarding Southland's responsibility for sales tax left unpaid by its 7-Eleven convenience store franchisees in New York. (T: 77-78)[1] DeFalco was particularly concerned about this potential tax liability, which might have amounted to more than a million dollars. (T: 82) For if his Northeast Division was ultimately forced to bear responsibility for this liability, the Division would have moved from being a profitable one to one that was operating at a loss. (T: 83) This downturn in fortune would have then led to a reduction in DeFalco's compensation. (*Id.*)

In January of 1977, DeFalco was introduced to Eugene Mastropieri by John Kelly, the owner of a company that did security work for Southland. (T: 85-86) At the time of their meeting, Mastropieri was a New York City Councilman and a practicing lawyer. (T: 85) The two men first met at the Pan American Hotel in Queens and had a lunch that lasted two and one-half to three hours. (T: 87) This meeting was a straightforward

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[1] The letter "T" refers to the trial transcript.

one, during which DeFalco talked in detail about the sales tax problem. (T: 87-88) Mastropieri's response was that he saw merit in Southland's view of the matter (T: 637) and could be of service to the company. (T: 88) He told DeFalco that he knew a number of people at the Sales Tax Commission, including James Tully, the chairman of the Commission. (T: 89) Finally, Mastropieri refused to set a fee, telling DeFalco that it would be discussed at a later time. (T: 89)

After this meeting, DeFalco spoke to co-defendant S. Richmond Dole, his superior, on the telephone and told him of his desire to use Mastropieri as a lawyer because of Mastropieri's political connections. (T: 89) Dole had little response and DeFalco said that he would call Clark Matthews, chief of Southland's legal department, to secure approval for retaining Mastropieri. Upon calling Matthews, DeFalco repeated what he had told Dole and Matthews gave approval to retain Mastropieri. (T: 90-91)

A week or two later, Mastropieri and DeFalco met again for dinner at the Northshore Steak House on Long Island. (T: 92) The business part of this meeting lasted perhaps 45 minutes, after which they were joined by Mastropieri's wife. (*Id.*) As with their first meeting, the initial business conversation between DeFalco and Mastropieri was typical of most lawyer-client conferences. Mastropieri began with a series of very technical questions about the data they had previously discussed. (T: 92) When DeFalco's answers continually referred "to a judicial-type process and hearing, about testifying before a judge and so forth" (*id.*), Mastropieri stepped in to correct him. He instructed DeFalco that the sales tax matter involved "an administrative type of hearing and it would not, at least at this stage, require a formal judicial environment." (T: 92-93)

Mastropieri then continued — and it was this part of the conversation that formed the crux of the conspiracy charge against him. According to DeFalco, Mastropieri stated that the Tax Commissioners were political ap-

pointees and that below these appointees was a bureaucratic level of personnel who were tax professionals. Mastropieri told DeFalco that he was friendly with some of the commissioners as well as members of the bureaucracy. (T: 93) He further explained that it was these people at the bureaucratic level who often made the ultimate decision, essentially instructing a commissioner how to vote on a particular matter. (T: 93-94) At this point, Mastropieri "stated again that he knew and had worked with a number of these people, and [then] he changed his expression and leaned forward on the table and said, this may require some heavy entertainment ...." (T: 94) This change of expression was "sort of a smile" (T: 95) and DeFalco responded by telling Mastropieri "that that was possible, that we had entertained people before." (T: 95)

Although the word "bribe" was never used then (T: 675) or later (T: 663-64), DeFalco *unilaterally* interpreted Mastropieri's statement to mean that Mastropieri would "be paying somebody off." (T: 96) According to DeFalco, he immediately called Dole on the telephone and told him this. (T: 96) Dole responded by saying that DeFalco should take care of it. (T: 97)

After this conversation with Dole, DeFalco made a few unsuccessful attempts to reach Mastropieri (T: 97) and then asked John Kelly to find out what Mastropieri's fee demands were. (*Id.*) Kelly then told DeFalco that Mastropieri said the fee would be $45,000 in cash — $25,000 as an up front payment and $20,000 for the "expenses" that DeFalco and Mastropieri had discussed. (T: 97-98) When DeFalco asked why the money had to be in cash, Kelly stated that Mastropieri had told him that he [Mastropieri] was going to sever his relations with his partner and did not want to run the money through the business. (T: 98)[2]

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[2] Significantly, John Kelly, who had cooperated with the government but was not called as its witness, testified as a Southland defense witness and unequivocally denied that he had ever told DeFalco that Mastropieri wanted $45,000 in cash. (T: 2180)

Upon reporting this proposal to Dole and learning that this amount of cash could not be generated (T: 98-100), Kelly, apparently speaking for Mastropieri, and DeFalco supposedly discussed other possible ways of making payment. (T: 111) Among them, was to have Southland pretend to lease a jet aircraft for $78,000. $45,000 of this money would then be funneled in cash to Mastropieri (T: 112), with the other $33,000 going to set up a separate "security political contribution fund." (T: 113) [3] After reporting the lease proposal to Dole (T: 114), DeFalco heard from Matthews, who rejected it and stated that "he didn't want to see any more funny proposals come through that we needed to have a plain legal bill." (T: 115) Accordingly, DeFalco asked Kelly to ask Mastropieri whether Mastropieri would be willing to submit an inflated legal bill to cover the "political contribution" fund that Kelly and DeFalco had discussed. (T: 115) Kelly informed DeFalco that Mastropieri would be willing to do so and a figure of $96,500 was arrived at. (T: 116) According to DeFalco, this figure represented $25,000 for Mastropieri's fee, $20,000 for the supposed bribe of the tax official, $30,000 for the corporate security fund, and $21,500 to cover the taxes Mr. Kelly would have to pay on the money. (T: 118) The plan was for Mastropieri to receive the fee, deposit it in an escrow account, and then immediately write a check to Mr. Kelly for the same amount. (T: 116)

Subsequently, Mastropieri sent DeFalco a legal bill for $96,500. (T: 133-34) This bill stated that the money was a "balance due October 1976 through May of 1977," a notation that was included at DeFalco's request. (T: 134) After receiving it, DeFalco sent it to Dole in late May or June of 1977. (T: 135) It had previously been agreed that Dole would take care of arranging payment so that the fee would not be charged against the

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[3] Again, Kelly unequivocally denied making this airline lease suggestion to DeFalco. (T: 2180-81)

Northeast Division's profits. (T: 119-20)[4] After three or four weeks, Southland sent a check, dated July 7, 1977, to Mastropieri. (T: 138) The check was sent to DeFalco, who then forwarded it to Kelly. (T: 139) As planned, Kelly brought the check to Mastropieri, who gave him his own check for the same amount in return.

By this time, though, DeFalco's plan had changed, as he decided that he was going to steal $10,000 of the money and put it to his own use. (T: 142-43) Accordingly, on August 8, 1977, DeFalco had Kelly wire $10,000 to him from the personal account at the Bank of Montreal in Toronto that Kelly had opened up with the Mastropieri money. (T: 154) Then, on August 23, 1977, Kelly and DeFalco flew to Toronto together and visited the Bank of Montreal. (T: 146) DeFalco, falsely claiming he was self-employed (*id.*), opened an account with a $20,000 deposit.[5] (T: 147) This money came from the Kelly account and contained the Mastropieri money. (*Id.*) On that same day, Kelly made out four checks, totaling $18,500, on the Bank of Montreal account payable to DeFalco. (T: 158-59) DeFalco also used this money for personal reasons. (T: 160) In sum, then, by August 23, 1977, DeFalco had already stolen $28,500 of the total $96,500 payment. (T: 160)[6]

DeFalco's financial machinations, though, had no effect upon Mastropieri. Months before ever sending his bill, and even though he supposedly wanted to be paid in

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[4] Dole's testimony explained that he arranged for the expedited and somewhat unusual payment so that this large, but apparently (to him) legitimate legal bill would not have a negative impact upon the Northeast Division's profits. (T: 2423-25)

[5] This $20,000 was supposedly reserved for the bribe. (T: 147)

[6] There was no evidence that Mastropieri had any knowledge of DeFalco's thefts or, for that matter, any of the activity involving the ultimate use of the $96,500. (*See* T: 686-89) Indeed, the trial court dismissed, for lack of sufficient evidence, the mail and wire fraud charges against Mastropieri stemming from DeFalco's theft.

advance, Mastropieri began legitimate work on the matter. In April of 1977, he advised DeFalco that he had arranged for a hearing before a number of members of the State Tax Commission and that DeFalco would have to accompany him and testify. (T: 164) Prior to the hearing, they met at a coffee shop in the World Trade Center. (*Id.*) Mastropieri told DeFalco that Mr. Tully, the Chairman, would not be at the meeting but that a very high ranking Assistant Commissioner would be there and that it would be an informal type of hearing where nothing was going to be decided. (T: 165) At this hearing, Mastropieri made a number of statements and "a long period of time went on whereby they would simply ask questions of me [DeFalco], various people in the room would ask questions relative to the case." (T: 165) As predicted, though, nothing was decided at this meeting.[7] (*Id.*)

The next event in Mastropieri's representation of Southland took place in August of 1977, when DeFalco sent Mastropieri a draft of a Tax Commission opinion, favorable to Southland,[8] that he had helped him prepare. (T: 167) According to DeFalco, Mastropieri had called him and asked to have this draft decision prepared by Southland. (T: 168) Initially, DeFalco compiled all the necessary documentation and then had Thomas Dougherty, Southland's other lawyer in the sales tax case, prepare the opinion. (T: 168) According to Dougherty, This procedure was "slightly unusual or irregular" but it was not the first time Dougherty had heard of it happening. (T: 168; 2254)

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[7] Louis Martin Jacobson, a defense witness, testified that he attended this meeting in his capacity of Executive Deputy Commissioner of the Tax Commission. The memorandum he prepared after the hearing makes clear that Mastropieri conducted himself in a wholly professional manner. (T: 1522-24) Moreover, Jacobson testified that Mastropieri never offered a payoff or "entertained" him. (T: 1529) Indeed, Mastropieri did not even mention that he was a City Councilman.

[8] If adopted, the draft decision would have held that Southland was no longer liable for the sales tax in dispute. (T: 171)

After this draft decision was sent to Mastropieri, little else happened until December of 1977, when DeFalco sent a letter to Dole informing him that "both attorneys" had advised him that the sales tax matter would be resolved favorably by mid-January. (T: 226) To the contrary, though, Thomas Dougherty denied ever telling DeFalco this. (T: 2258-59) Not surprisingly, then, the matter was not resolved in January.

Thus, at the end of 1977, Mastropieri still had not received any money and no bribe had been paid. (T: 226-27) However, more money from the $96,500 was taken by DeFalco for his personal use. On September 21, 1977, another $3,000 was transferred from the Bank of Montreal to DeFalco's Chase Manhattan Bank account in New York. (T: 229)[9]

In light of this frequent illicit activity by DeFalco, it is understandable that, upon learning that Clark Matthews would be interviewing Mastropieri about the circumstances of Southland's payment, DeFalco immediately contacted Mastropieri and instructed him on what to say to Matthews. (T: 232-33) Specifically, DeFalco told Mastropieri to keep away from the details of what had occurred because Mathews was supposedly well aware of the case and to say only that there had been "an arrangement with the company and his bill had been paid and he was continuing to represent the company." (T: 233) Subsequently, DeFalco learned from Dole that a phone interview between Mastropieri and Matthews had taken place (T: 233) and that, during this conversation, Mastropieri had "alluded to or expanded the terms of his relationship to include something of his services would go beyond the present situation should need arise for appeals." (T: 242)[10]

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[9] In November of 1977, DeFalco put $5,000 back into the Bank of Montreal account. (T: 231) This money came from a bonus he had received. (*Id.*)

[10] *See infra,* at 13, for a more detailed discussion of this alleged conversation.

After this phone conversation, Matthews sent Mastropieri a letter detailing Southland's policies for outside counsel and requesting information from Mastropieri. (T: 247) Mastropieri, however, did not respond and, in February or March of 1978, DeFalco again spoke to Mastropieri about the matter. (T: 247) During this conversation, Mastropieri said that he had not responded with a letter because he did not know what to say. DeFalco then told him "to put into letter form, evidently what he had said earlier relative that he had a contractual arrangement with us for a specific fee; that he was in fact performing these services and he has been paid." (T: 248) On March 27, 1978, Mastropieri sent this letter. (Government Exhibit 46) Needless to say, DeFalco had good reason for wanting Mastropieri to comply with Matthews' request and, hopefully, put any suspicions about the matter to rest. For during March of 1978, he stole another $4,000 from the Bank of Montreal account. (T: 249) [11]

Ultimately, then, it was DeFalco who provided all of the government's significant non-hearsay proof as to Mastropieri's involvement in the alleged conspiracy to violate the Travel Act.[12] Significantly, though, DeFalco's own testimony, left open real questions as to whether Mastropieri ever entered such a conspiracy. *First,* as DeFalco admitted, Mastropieri never used the word bribe and never said anything about a payoff. (T: 643-44) Rather, DeFalco reached the conclusion that a bribe was going to be paid solely on the basis of Mastropieri's use

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[11] Over the next two years, DeFalco continued to steal money from the account in his name, and, by August 1979, had appropriated the entire $20,000 for himself. (T: 249)

[12] In addition, in support of its charge of conspiracy to defraud the United States, the government offered into evidence (1) a Form "1099" issued by Southland to Mastropieri showing that Southland had paid Mastropieri $96,500 (Government Exhibit 51) and, (2) a portion of Eugene Mastropieri's grand jury testimony in which he stated that he assumed that the "fee" would be deducted by Southland as a business expense. (A: 267-68)

of the word "entertainment."[13] *Second,* Mastropieri went about his representation of Southland in a manner that did not suggest an incipient bribe. Indeed, prior to the World Trade Center meeting, DeFalco and Mastropieri reviewed the merits of the case and, again, the word bribery was never mentioned. (T: 663-64) *Third,* it is extremely significant that Mastropieri never earned any money from his representation of Southland. Even though he supposedly wanted $25,000 cash up front, he went ahead and represented the company without compensation. (T: 667) Indeed, Mastropieri did not even ask for money at the end of 1977 when, according to DeFalco's letter to Dole, Mastropieri believed that the sales tax matter was close to resolution. (T: 674)

B. The Activities At the Southland Corporation

The only people in this scheme with whom Eugene Mastropieri had direct dealing were Eugene DeFalco and John Kelly.[14] However, there was more to this case than Mastropieri's meetings with DeFalco and Kelly. For, as noted previously, DeFalco was speaking to both Dole and Clark Matthews about the sales tax problem. Moreover, according to DeFalco, Southland's chairman, John P. Thompson, was briefed on the matter at a February, 1977, meeting, in Hartford, Connecticut, with Dole and Frank Kitchen. (T: 123) At this meeting, Thompson apparently acknowledged that he knew about

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[13] Interestingly, although he was not the least bit shy about inculpating Mastropieri solely upon his own interpretations of Mastropieri's language, DeFalco took quite a different view when other people interpreted *his* language. Thus, when asked whether he had said anything to Frank Kitchen, a manager of Southland's Northeast region, about whether a proposed bribe had been approved by Southland, DeFalco stated: "Mr. Kitchen could have construed anything that would be his problem . . . If he made an assumption of any kind at that time I can't be responsible for that." (T: 522)

[14] Additionally, there was the hearsay evidence suggesting that Mastropieri had spoken to Clark Matthews on the telephone. *See infra,* at 13.

the airplane lease suggestion but, more importantly, wanted to know what Mastropieri's representation was going to cost. (T: 124-26) DeFalco explained that it was a one-time fee to handle all expenses and that "entertainment" was included in these expenses. (T: 126) When this word was used, Dole looked at DeFalco and chuckled. (*Id.*)[15] Thompson then said he wanted to speak to Matthews before he made a commitment on the allocation of funds. (T: 126-27)[16] Later that month, Dole informed DeFalco that the bill would be paid by a transfer of funds to one of Southland's corporate accrual accounts.

The rest of the significant evidence at trial involved a Business Ethics Review ("BER") instituted by Southland at the request of the Securities and Exchange Commission. (T: 1540) In connection with the BER, a questionnaire was developed and distributed to various employees. (T: 1542) One of these questionnaires, filled in by Eugene Pender, Southland's corporate controller, stated: "I suspect that a payment made in the N/E Stores division to a law firm about July 1977 was inflated to cover costs other than legal fees. Dick Dole should know the full details." (Government Exhibit 44a) Pender had no personal knowledge of whether such a payment had been made and explained to Michael Davis, a Southland corporate attorney assigned to work on the BER, that his statement in the BER was the sum total of all he knew. (T: 1031)

In addition to Pender, Davis interviewed Frank Kitchen, DeFalco's immediate superior. In his answer to the BER questionnaire, Kitchen had not mentioned the Mastropieri matter. However, Kitchen told Dole that during the February, 1977, meeting with Thompson, Dole and DeFalco, he had come to suspect that the

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[15] In the grand jury, though, DeFalco never mentioned this supposed chuckle. (T: 291)

[16] Both Dole (T: 2415-16) and Thompson (T: 2334-35) unequivocally denied this account of the meeting.

discussion during that meeting involved a bribe of a New York State tax official. (T: 1605-06) The basis for Kitchen's suspicion was (1) Mastropieri's Italian name; (2) the size of Mastropieri's fee; (3) discussion of a "New York agency"; and (4) that the word "entertainment" was used. (T: 1606) Kitchen also told Davis that, after the meeting, Dole and DeFalco had told him that his suspicion was groundless. In light of Kitchen's statement, Davis asked him to amend his questionnaire response to include these suspicions. (T: 1606-07) Kitchen then did so. (Government Exhibit 31)

The last significant BER evidence concerning the Mastropieri matter involved the previously mentioned alleged phone conversation between Matthews and Mastropieri. This conversation allegedly took place on January 10, 1978. William Atwell, a member of Southland's Board of Directors and Audit Committee (T: 1189-90), testified that Matthews had told him (1) that Mastropieri had been incensed about any insinuation that any part of his bill would not go toward a legal fee and (2) that Mastropieri had told Matthews that the money amounted to a one-time charge and would pay for all expenses in the case, including any appeals. (T: 1211)

This, then, was the sum of the government's case.[17] Although Mastropieri presented no defense, his co-defendants did present substantial evidence that undercut the government's case. However, for the purposes of this petition, it is unnecessary to discuss that evidence.

[17] Additionally, a note prepared by Matthews at an undetermined time was admitted into evidence. Part of this note seemed to read "take care of for 40M to be spread among mems. tax commission." (Government Exhibit 107-D)

Petitioner's Appeal and the Court of Appeals' Affirmance of His Conviction

On appeal, petitioner urged a number of interrelated arguments, only two of which are relevant here. First, petitioner argued that his conviction for the "defrauding the United States" prong of the charged conspiracy was infirm because the trial court had admitted portions of petitioner's grand jury testimony but then improperly excluded additional explanatory portions of that testimony. The Court of Appeals agreed that this was error. (22a)

However, the Court did not reach the issue of whether petitioner's conviction should be reversed because it rejected petitioner's second argument, which was addressed to the sealing of the initial Travel Act conspiracy indictment in this case. As the Court of Appeals recognized, "the last overt act charged against [petitioner] in the bribery part of the conspiracy occurred on March 27, 1978." (23a) Hence, the statute of limitations, 18 U.S.C. § 3282, required the grand jury to indict Mastropieri by March 27, 1983. In fact, the indictment was returned by the grand jury on March 25, 1983. (*Id.*) However, at that time, the government, pursuant to Fed. R. Crim. P. 6(e)(4), obtained an order sealing the indictment on the ground that its announcement "would make it more difficult for the government to obtain complete and truthful testimony from Frank Kitchen, a vice president of Southland who had been granted immunity, *see Matter of Kitchen,* 706 F.2d 1266 (2d Cir. 1983)." (*Id.*) Thereafter, the indictment was unsealed on May 5, 1983 (*id.*), after the limitations period had expired.

In both the Court of Appeals and the District Court, petitioner maintained that prosecution on the Travel Act prong of the conspiracy charge was barred by the statute of limitations because the indictment had been improperly sealed and then unsealed after the expiration of the limitations period. Petitioner argued that, by the express terms of Rule 6(e)(4), an indictment may be

sealed only to assist in achieving custody of a defendant or a co-defendant and, if an indictment is sealed for another reason, prosecution will be barred if it is unsealed after expiration of the limitations period.

In rejecting petitioner's claim, and thereby affirming his conviction, the Court of Appeals held that, despite the clear language of Rule 6, an indictment can be sealed for reasons other than obtaining custody of a defendant or co-defendant and that the reason relied upon by the government in this case was sufficient.

REASONS FOR GRANTING THE WRIT

I

The Initial Travel Act Conspiracy Indictment Was Improperly Sealed and Is Barred by the Statute of Limitations; Accordingly, This Court Should Remand This Case to the Court of Appeals for Determination of Whether the Error in Excluding Portions of Petitioner's Grand Jury Testimony Was Harmless.

Fed. R. Crim. P. 6(e) (4) states:

> The federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

The clear language of the Rule, as well as the case law interpreting it, makes clear that an indictment is properly sealed only when secrecy is needed in order to obtain custody over one or more defendants. See United States v. Sherwood, 38 F.R.D. 14, 20 (D.Conn. 1964). This is the *only* legitimate reason for sealing an indictment. *See United States v. Slochowsky,* 575 F.Supp. 1562, 1566-67, 1568 (E.D.N.Y. 1983).

If an indictment is properly sealed, the statute of limitations is tolled from the date of sealing until the date of unsealing. Hence, so long as the indictment is returned within the statute of limitations, the prosecution will not be barred if it is unsealed after the statute has run. *However, where an indictment is unjustifiably sealed, the statute of limitations is not tolled for the period of time between the sealing and unsealing.* As the court stated in *United States v. Slochowsky, supra,* 575 F.Supp. at 1567: "If the government cannot demonstrate . . . a [legitimate] prosecutorial need [for] sealing, the expiration of the statute of limitations prior to unsealing would invalidate the indictment as in any case where an indictment is untimely filed."

Moreover, where there has been an *improper* sealing and the indictment is unsealed after the statute of limitations has run, a defendant is entitled to dismissal of the indictment, even in the absence of a showing of prejudice. As the Court stated in *United States v. Watson,* 599 F.2d 1149, 1155 (2d Cir. 1979), *modified sub nom., United States v. Muse,* 633 F.2d at 1041 (2d Cir. 1980), (*en banc*), *cert. denied,* 450 U.S. 984 (1981):

> *Ordinarily, when the limitations period has passed, "there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced,"* . . . and so we bar prosecution — however strong the prosecutorial interest may be. There is a narrow exception to this rule where the prosecution has delayed beyond the limitations period in unsealing a timely indictment. In such a case, we do not give force to the presumption and, if the defendant does not demonstrate actual prejudice, we tolerate delay justified by *a legitimate prosecutorial need* in unsealing the indictment.

690 F.2d at 16 (Emphasis supplied).

Thus, the clear and correct teaching of *Watson* is that *prejudice need be shown only when an indictment has been properly sealed.* Where there is an erroneous

sealing, however, prejudice sufficient to warrant dismissal of an indictment is *presumed*. Significantly, the Court of Appeals decision herein never disputes this claim. This is also the teaching of *United States v. Colosito*, 488 F.Supp. 531 (D.Mass. 1980), where, upon rejecting the government's reasons for a mere 62-day sealing of an indictment, the Court dismissed the charges against the defendant. The Court stated: "To allow the government in these circumstances to extend the statute of limitations, even for a short period of time, would seriously undermine the role which statutes of limitations have traditionally served in protecting criminal defendants against the power of the government." 488 F.Supp. at 538.

Here, of course, it is clear that the indictment was improperly sealed. According to the government, the sealing had been necessary because failure to do so would have compromised its efforts to obtain Frank Kitchen's truthful testimony. (A: 153) However, as both the clear language of the Rule and the case law cited above shows, Rule 6(e) does not permit sealing of an indictment for this reason. Rather, it provides for sealing *only* in order to obtain custody over a defendant. *See United States v. Slochowsky, supra*, 575 F.Supp. at 1568 (Government's desire to conceal extent of a conspirator's cooperation and shield him from threats does not justify sealing an indictment). Since the rule, in practice, allows for an extension of the statute of limitations, *see United States v. Watson, supra*, 690 F.2d at 16, it should be strictly construed. *Toussie v. United States*, 397 U.S. 112, 115 (1970).

United States v. Sherwood, supra, illustrates this point. In *Sherwood*, the government kept an indictment sealed for 11 out of 13 months primarily because it needed the time to evaluate a commitment not to prosecute another defendant. Finding that Fed. R. Crim. P. 6(e) does not permit sealing of an indictment for this purpose, the Court dismissed the indictment against three other defendants because the statute of limitations

had run out during the period the indictment had been sealed. The court stated:

> The five-year criminal statute of limitations would have little or no meaning were the law to be construed otherwise. A person would never know with certainty that a sealed indictment might be lurking in undisclosed government files, held in abeyance for a year or years to satisfy the personal motives of the government official. To be a nation of law, and not subject to the whims of men, law must be administered uniformly and objectively.

38 F.R.D. at 20.

Further, this is not a case such as *United States v. Slochowsky, supra,* where the court rejected a claim of improper sealing because the government was able to show (1) that disclosure of the indictment therein would have compromised its efforts to induce the surrender of a fugitive and (2) that there was a good faith basis for believing that another defendant either was and would remain in Israel or would flee there if indicted. 575 F.Supp. at 1567-68.[18] Here, there were no such concerns and, accordingly, there was no valid reason for sealing the indictment.

Moreover, even if concern that knowledge of an indictment might compromise government efforts to obtain truthful testimony from other witnesses were viewed as a legitimate reason for sealing an indictment, this change in the law should have provided no comfort to the government here. For the government simply had no substantial basis for concluding that Frank Kitchen's testimony had been false or evasive. Indeed, in *Matter of Kitchen,* 706 F.2d 1266, 1274-76 (2d Cir. 1983), the Second Circuit in reversing a civil contempt citation against Kitchen, found that there was insufficient evidence to

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[18] Indeed, as noted above, the *Slochowsky* court made clear that, absent these bona fide reasons for sealing, it would have dismissed the indictment at issue there on statute of limitations grounds. 575 F.Supp. at 1567, 1568-69.

establish that Kitchen had testified falsely or with intentional evasiveness in the grand jury. Under these circumstances, then, even assuming that Rule 6(e) should not be strictly construed, there was no valid reason for sealing the indictment. Mastropieri's clear right to prompt notice of the charges against him should not have been sacrificed to the government's fantasies about Kitchen.

Accordingly, then, this Court should reverse the Court of Appeals on the question of whether the Travel Act prong of the conspiracy charged in this case is barred by the statute of limitations and then remand the case to the Court of Appeals for the purpose of determining whether the trial court's erroneous refusal to admit portions of petitioner's grand jury testimony was harmless.

II

Pursuant to Rule 19.4 of This Court, Petitioner Joins in the Arguments Contained in the Petition of Co-Defendant Southland Corporation Insofar as They Are Applicable to Him and Not Inconsistent With the Arguments Raised Herein.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDICES

Appendix A
Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 479, 534 — August Term, 1984

(Argued: January 17, 1985 Decided: April 23, 1985)

Docket Nos. 84-1284, -1307

UNITED STATES OF AMERICA,

Appellee,

—against—

THE SOUTHLAND CORPORATION and
S. RICHMOND DOLE and EUGENE MASTROPIERI,

Defendants,

THE SOUTHLAND CORPORATION,
EUGENE MASTROPIERI,

Defendant-Appellants.

Before:

FEINBERG, *Chief Judge,* FRIENDLY and
MANSFIELD, *Circuit Judges.*

Appeal from a judgment of the District Court for the Eastern District of New York, Charles P. Sifton, *Judge,* convicting The Southland Corporation and Eugene Mastropieri under a single count indictment charging these defendants and S. Richmond Dole, a Vice President of Southland, with conspiracy to commit an offense against the United States in violation of 18 U.S.C. § 1952 (the Travel Act) and to defraud the United States by impeding the functions of the Internal Revenue Service in the ascertainment and collection of income taxes. Affirmed.

Appendix A
Opinion of United States Court of Appeals

Gerald L. Shargel, New York, New York *for Defendant-Appellant Eugene Mastropieri.*

Peter Bleakley, Washington, D.C. (William J. Baer, Robert N. Weiner, Edward L. Wolf, Arnold & Porter, Washington, D.C.) *for Defendant-Appellant The Southland Corporation.*

Gregory Wallance, Assistant United States Attorney for the Eastern District of New York, Brooklyn, New York (Raymond Dearie, United States Attorney for the Eastern District of New York and Jane Simkin Smith, Assistant United States Attorney), *for Appellee.*

FRIENDLY, *Circuit Judge:*

The Southland Corporation, a large retailer with headquarters in Dallas, Texas, and Eugene Mastropieri, a lawyer in the borough of Queens who was a member of the New York City Council, appeal from judgments of conviction, rendered after trial before Judge Sifton and a jury in the District Court for the Eastern District of New York.[1] The convictions were rendered on a single count superseding indictment, charging a conspiracy in violation of 18 U.S.C. § 371, having two objectives as set forth below. Mastropieri was sentenced to 18 months in prison and Southland to a fine of $10,000.

The indictment began by alleging that there were pending before the Department of Taxation and Finance of the State of New York various cases which concerned Southland's liability for sales taxes due and owing upon

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[1] The jury was unable to reach a verdict with respect to a third defendant, S. Richmond Dole, who was a Vice President of Southland.

the sale of merchandise through 7-Eleven stores franchised by Southland and for other reasons. It proceeded to allege that defendants conspired to travel in foreign and interstate commerce and use facilities in interstate commerce with intent to bribe state officials in violation of Article 200 of the Penal Law of the State of New York in relation to such taxes and had also conspired to defraud the United States by impeding the function of the Internal Revenue Service in determining the true nature of Southland's business expenses by causing amounts intended to be paid as bribes to such officials to appear on Southland's corporation tax return as legal fees to Mastropieri. Various steps in the conspiracy were alleged in further detail. The last overt act relating to the Travel Act objective occurred on March 27, 1978; the last overt act relating to the fraud on the United States occurred on November 24, 1980. Pursuant to a special verdict Mastropieri was found guilty of conspiring to achieve both objectives; Southland was found guilty of conspiring only with respect to the tax fraud objective.

DISCUSSION

I. *Sufficiency of the Evidence*

The jury could reasonably have found the facts to be as follows: Some of Southland's 7-Eleven convenience stores in New York were owned by the corporation; some were franchised. In 1977 Vice President S. Richmond Dole was headquarters executive in charge of all Southland franchise stores. The stores were divided into regions, each with its own manager. In 1977 the Northern Region Manager was Frank Kitchen. A part of that region, the Northeast Division, which included New York State, was managed by Eugene DeFalco, the Government's principal witness. In 1973 the New York Department of Taxation and Finance began proceedings against 7-Eleven franchise store operators and against

Southland itself involving potential liability in excess of $1,000,000, on a legal theory which was by no means implausible. This was a considerable sum for the Northeast Division, which had had only one profitable year in its history. Also, because of bonus arrangements, De Falco had a direct stake in the Northeast Division's earnings.

In January, 1977, DeFalco was introduced by a corporate security consultant, John Kelly, to defendant Mastropieri, a New York City councilman from Queens. DeFalco reviewed the history of Southland's problems with the Tax Commission. Mastropieri said that he knew a number of people in the sales tax bureau, including the chairman of the Tax Commission, James Tully, that "he could be of service" to DeFalco and that he would later be able to estimate the cost. DeFalco reported the meeting to Dole and to Clark J. Matthews II, Southland's general counsel. In a meeting a week later DeFalco told Mastropieri that he anticipated testifying before a judge in a formal proceeding relating to the tax dispute. Mastropieri interjected that sales tax cases were decided without formal hearings by tax commissioners who were political appointees and their aides who were professionals, and that he was very friendly with both. He explained that it would not be uncommon for the aides to mark the commissioners' agendas at the time of the hearing with indications how they should vote. After repeating that he had worked with a number of these people, Mastropieri said with a smile, "This may require heavy entertainment;" DeFalco answered "that was possible, we had entertained people before." DeFalco wanted to know what the entertainment would cost but Mastropieri deferred such inquiries.

DeFalco immediately reported to Dole that he and Mastropieri had discussed the case further, and that Mastropieri had told him "in very broad terms who he was going to work with in Albany, the bureaucrats and

Mr. [Tully]." DeFalco gave it to Dole as his opinion, based on the dinner conversation, that Mastropieri "was going to be paying somebody off." Dole said, "handle it or can you handle it and take care of it."

Kelly, Mastropieri and DeFalco then sought to come up with suitable financial arrangements. Mastropieri called for $45,000 in cash, of which he was to receive $25,000 "for an up front payment or retainer" and "$20,000 was to be for the expenses that [DeFalco] and he discussed." Dole advised DeFalco that it would be impossible to generate such a large sum in cash within the corporation. A second proposal was to enter into a phony airplane lease arrangement with a friend of Kelly; this ran into difficulties too numerous to be stated. Finally it was proposed that Mastropieri submit a legal bill for $96,500. Since this sum would have to come from the headquarter's accounts, this proposal was discussed, after a large sales meeting for the Northeast Division at the Hilton Hotel at Hartford, Connecticut, in the suite of John P. Thompson, Southland's CEO. The latter inquired about Mastropieri's fee. DeFalco explained it would be in the "90 to $100,000 range" and would include "entertainment." At the mention of this word Dole and DeFalco chuckled. When Kitchen complained in the hotel corridor as to what was going on, DeFalco gestured to Dole to handle him.

Shortly after the Hartford meeting Dole informed DeFalco that the Mastropieri fee would be paid from a corporate legal accrual account and how the bill should read. On July 7, 1977, Dole left with Eugene Pender, Southland's Controller, an undated bill reading as follows:

EUGENE F. MASTROPIERI
Attorney At Law
67-40 Myrtle Avenue
Glendale, New York 11227

Appendix A
Opinion of United States Court of Appeals

VAndyke 1-2210-1
VAndyke 1-3612-3

Mr. Eugene A. DeFalco
c/o The Southland Corporation
425 Cherry Street
Bedford Hills, New York 10507

FOR PROFESSIONAL SERVICES RENDERED

Balance Due October 1976 thru May 1977 $96,500.00

Dole asked that payment be expedited; when Pender asked why, Dole told him not to pursue that question any further. On the same day a check for $96,500 was made payable to Mastropieri and mailed to DeFalco. Southland took the entire $96,500 as a deductible business expense on its 1977 corporate income tax return. At the same time Southland sent an IRS Form 1099 to Mastropieri informing him that $96,500 was being reported to the IRS as a professional fee.

DeFalco sent the $96,500 check to Kelly with the note reproduced in the margin.[2] Kelly arranged to have Mastropieri call at his home on Sunday, July 17, 1977. Mastropieri brought with him a signed blank check on his firm's escrow account. Kelly handed him the Southland check, which Mastropieri would subsequently deposit in the escrow account. Kelly made the escrow account check payable to himself in the amount of $96,500 and later caused it to be deposited in his account at the Bank of Montreal in Toronto. DeFalco established an account in the same bank into which $20,000 was

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[2] "25 GM
10 GM (Re invoice/your baby)
13 JK (service fee)
48.5 Back in cash ASAP"

It is not disputed that "GM" means Eugene Mastropieri, JK means John Kelly, and ASAP means "as soon as possible."

deposited by intra-bank transfer to serve as a bribery slush fund. By way of numerous checks and wire transfers, an additional $28,500 was siphoned off by DeFalco for his personal use. The $48,000 that remained in Kelly's account was earmarked as Mastropieri's compensation and to cover Kelly's additional tax liability.

Mastropieri had had an inconclusive conference on April 22, 1977 with the state tax officials. In late 1977 Mastropieri asked DeFalco to prepare a draft opinion which the Tax Commission could adopt. DeFalco obliged with an opinion that stated that "[t]here is clear and convincing testimony on the part of Southland to the effect that in no case did it purchase the inventory . . . by repossession," when in fact there was no testimony of any sort, and that "the transfer of the merchandise inventory by the former owners to The Southland Corporation constitutes a transfer in settlement or realization of security interests which are expected from the general requirements of Article Six of the Uniform Commercial Code and the purposes of Section 1141(c) of the Tax Law."

Events were thus proceeding according to plan when, in early August 1977, high officials of Southland received a letter from senior management announcing the establishment of a Business Ethics Review (BER) program. The cover letter was accompanied by an eight page questionnaire and an explanatory memorandum from Clark J. Matthews II, the general counsel. The questions inquired concerning knowledge of any payments to government officials to settle any disputes including tax disputes, knowledge of any payment to any government official to "grease" or expedite matters, knowledge of the existence of any off-the-book accounts or slush funds, knowledge of any laundering or other recycling of funds, etc. DeFalco called Dole, who had been one of the signers of the covering letter, and asked whether Dole had any problem with any of the questions. Dole answered that

he didn't have a problem and asked if DeFalco did. DeFalco responded, "no, I don't have a problem anymore." DeFalco then answered the questions in the negative; Kitchen, after speaking with DeFalco, likewise omitted any mention of the Mastropieri matter. Pender, on the other hand, in responding to the question concerning "grease" payments to public officials, voiced his suspicion "that a payment made in the N/E Stores division to a law firm about July 1977 was inflated to cover costs other than legal fees. Dick Dole should have details."

Responsibility for supervising the BER was placed in Southland's Audit Committee, consisting of three outside directors who generally met once a month in the library of Southland's legal department. At some time during the first half of 1977, Matthews told the Audit Committee that Dole and DeFalco had approached him to pay a fee to a New York lawyer in the form of an airplane rental lease of $45,000. The Committee rejected this proposal and told Matthews to look into the matter further. As the BER got under way, Matthews took staff attorney Michael Davis on as an assistant for the project and instructed him to add the Mastropieri matter to the list of subjects for inquiry. While in Dallas at a business meeting on October 17 and 18, they interviewed DeFalco and Kitchen but not Pender or Dole.

The DeFalco interview disclosed a history conforming closely to what has been recounted. DeFalco said that part of the Mastropieri fee would be used for the "entertainment" of the Tax Commission members and staff; Davis, who took notes during the interview, later claimed that he understood this to mean "drinks, dinner, that kind of entertainment." There is a dispute whether a note by Davis, "Tully to get", was followed by a word reading "moving" or "money;" the jury could reasonably have found it to be the latter. After the conclusion of the interview Matthews, who was walking with DeFalco

and Davis to the parking lot, suggested that maybe he should talk to Mastropieri "to flush out some details;" DeFalco said "I would not touch that with a ten foot pole," explaining — falsely as matters turned out — that "at least five thousand dollars of the payoff had already been made".

The interview with Kitchen produced an admission that he thought a payoff was discussed at the mid-February 1977 meeting at Hartford attended by Dole, Thompson and DeFalco; later he correspondingly amended the answer to his questionnaire. The Audit Committee apparently having instructed Matthews to interview Mastropieri, DeFalco assured the latter that this would be a charade. Subsequently Matthews advised the Committee that he had spoken to Mastropieri and obtained assurances that there were no irregularities in his representation of Southland. Mastropieri also contributed a letter for Matthews' files stating that his fee arrangement with Southland had been agreed to and paid. Later Matthews wrote a summary of the BER's discoveries in regard to the Mastropieri matters which will be described in Point III below. The final report on the BER, however, made no reference to the Mastropieri matter.

Still Matthews and Davis were understandably concerned that, without some action on their part, the Mastropieri "legal fee" was going to be taken as a deduction on Southland's 1977 income tax return and raised the question of deductibility with the company's outside tax counsel, without, however, stating why they considered that the "fee" might not be a proper deduction. Apparently by accident, an IRS audit team learned of the BER, and requested a copy of the report and the underlying questionnaires. Matthews met with Davis and gave him a short list of names of persons whose answers to questionnaires should not be given to the IRS; the list included Pender and Kitchen. These

questionnaires were withheld although the IRS agents were falsely assured they had been given all questionnaires with positive responses.

The final piece of evidence worth recounting concerned a conversation between DeFalco and Dole in November 1980, two months after DeFalco had been promoted to a vice presidency and assigned to the Dallas headquarters. Dole, who had become aware of the FBI's investigation of the Mastropieri fee and thought the bribe had been paid, called DeFalco and instructed him not to reveal the existence of the bribery scheme. During the course of the conversation, DeFalco wrote down on the back of an office telephone message slip:

> 11-24
>
> Dole called —
>
> Blood oath on N.Y. deal
>
> Hang together or we all can get into trouble.

In light of the facts which the jury was entitled to find, appellants' arguments with respect to insufficiency, including the argument that the coconspirators did not know that "heavy entertainment" could include bribery, border on the frivolous. The only ones even deserving mention are some of Southland's more particularized arguments. One of those is that the Government failed adequately to demonstrate that Southland was aware of 26 U.S.C. § 162(c) which forbids deduction of a bribe in determining net income. Ignorance of the law is no defense to a charge of purposeful and intentional action. *United States v. Gregg*, 612 F.2d 43, 51 (2 Cir. 1979). Furthermore, the indictment did not turn on 26 U.S.C. § 162(c); the charge was conspiring to defraud the United States by obstructing the IRS in performing the function of determining Southland's allowable deductions, and it is absurd to suppose that the Southland officials concerned with the Mastropieri matter did not know that

deductions may be taken only for "ordinary and necessary" business expenses, 26 U.S.C. § 162(a), and that a bribe is not such an expense. Finally, there was evidence that Dole, DeFalco, Matthews and Davis were all very much concerned that the $96,500 payment was being improperly taken as a deduction.

A shade more needs to be said in regard to Southland's contention that the Government proved only an intent to deprive the State of New York of a fair hearing with respect to Southland's New York sales taxes rather than an intent to deprive the United States of income tax. It may well be true that when DeFalco began his relationship with Mastropieri, defrauding the United States was not in his mind. However, it was not too long before the conspirators became aware that the means chosen to conceal the payment of the intended bribe, a $96,500 legal fee, was almost certain to find its way into the deductions in Southland's 1977 income tax return. This is evidenced by the sending of the Form 1099 to Mastropieri, as well as much other conduct related heretofore and hereafter. If the Southland officials had wished to avoid defrauding the United States, they needed only to advise Southland's Treasurer that the $96,500 deduction for legal fees should not have been taken and that an amended return omitting this deduction should be filed. Section 371 has often been applied to reach conduct intended to defraud the United States, although the original activity was aimed at quite different objectives. A good example is *United States v. Parker*, 469 F.2d 884, 895-96 (10 Cir. 1972). There the defendants made Molotov cocktails and other bombs to burn buildings belonging to their competitors and enemies. The court upheld their conviction under § 371 for conspiring to defraud the United States because they did not pay the required taxes on the explosive devices. Where defendants are shown to have intended to defraud the United States, they cannot escape liability by showing that this intent was merely incidental to some other

action which constituted their primary motivation. *See United States v. Barker,* 546 F.2d 940, 945 (D.C. Cir. 1976) (Wilkey, J., concurring).

II. *The Dual Statute of Limitations Instruction*

Judge Sifton charged the jury that a conspiracy to violate the Travel Act has a five year statute of limitations, *see* 18 U.S.C. § 3282. He further instructed that, in the language of 26 U.S.C. § 6531(1), the period of limitations is six years for "offenses arising under the internal revenue laws" and "involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not." Hence, in order to convict under the portion of the indictment charging a conspiracy to violate the Travel Act the jury had to find an overt act within five years of the return of the indictment but to convict under the portion of the indictment charging a conspiracy to defraud the United States, it needed to find only an overt act within six years.

On its face the charge seems to be precisely what the statutes require. Clearly this is what the judge would have had to instruct if the indictment had contained two conspiracy counts instead of one. In opposition, appellants urge a somewhat metaphysical argument that since the indictment charges only one crime, there can be only one applicable period of limitations, just as there can be only one punishment, *see Braverman v. United States,* 317 U.S. 49, 53-54 (1942). Whatever the philosophical merits of the argument may or may not be, we fail to see a good sense basis for it. If the Government adduced sufficient evidence to convince the jury that Southland conspired to defraud it within the six year period provided by 26 U.S.C. § 6531(1), as we have held that it did, we do not see why it should be deprived of a conviction for this violation of 18 U.S.C. § 371 because it failed to establish to the jury's satisfaction that Southland also engaged, during a five year period antedating

the indictment, in a conspiracy to violate the Travel Act. Even more clearly, if the Government established to the jury's satisfaction that Mastropieri had engaged in a conspiracy to violate the Travel Act within five years and to defraud the United States within six, we cannot see what is wrong in his being convicted for a conspiracy with both objectives. Any danger of jury confusion was eliminated by the taking of special verdicts as to each object. If the Government had failed to present sufficient substantive evidence to warrant submission of the Travel Act objective to the jury but did meet its burden with respect to the fraud objective and the jury convicted, defendants would surely not have been entitled to have the indictment dismissed. *See United States v. James,* 528 F.2d 999, 1014 (5 Cir.), *cert. denied,* 429 U.S. 959 (1976). We fail to perceive how their case stands better because the Government did present sufficient evidence to send to the jury the case with respect to both defendants and both objectives.

So far as the authorities are concerned, neither *United States v. Cunningham,* 723 F.2d 217 (2 Cir. 1983), *cert. denied,* 104 S.Ct. 2154 (1984), nor *United States v. Fruehauf Corp.,* 577 F.2d 1038, 1069-70 (6 Cir.), *cert. denied,* 439 U.S. 953 (1978), gives the defendants the support that is claimed. On the other hand, *United States v. Albanese,* 123 F. Supp. 732 (S.D.N.Y. 1954), *aff'd,* 224 F.2d 879 (2 Cir.), *cert. denied,* 350 U.S. 845 (1950), does not give the Government all the support for which it contends. This leaves us with *United States v. Head,* 641 F.2d 174 (4 Cir. 1981), *cert. denied,* 103 S.Ct. 3113 (1983). The actual holding in that case was simply that where an indictment alleged a conspiracy with three unlawful objects, two of them carrying a five and one a six year period of limitations, and a question of limitations had been raised with respect to the former, it was error for the court to have instructed merely that it was enough for the Government to have proved that the

defendant had conspired to violate one of the three statutes. Since the jury was asked only to render a general verdict, this created the possibility of a conviction solely as to objects subject to the five year statute although no act occurred within that period. After this clearly correct holding, the court added in an unnecessary footnote:

> The government contends that a five-year period applies only to a conspiracy to violate the bribery laws while a six-year period would apply to a conspiracy with tax objects . . . While this may be true, we are not convinced that this difference would require the "hybrid" statute of limitations charge suggested by the government. In a multiple-object conspiracy where the object crimes bring into play differing statutes of limitations, the proper course may be to apply the role of lenity in construing the statutes and apply the shorter limitations period to the entire conspiracy.

641 F.2d at 178 n.5. Apart from the fact that all this was dictum, the court did not commit itself; it said only that "[i]n a multiple-object conspiracy where the object crimes bring into play different statutes of limitations, the proper course *may be* to apply the rule of lenity in construing the statutes and apply the shorter limitations period to the entire conspiracy." *Id.* (emphasis supplied). On further reflection the court might well have decided otherwise. In the first place the rule of lenity operates only where there is a fair basis for the construction urged by the defense, *see, e.g., Callanan v. United States,* 364 U.S. 587, 596 (1961); *United States v. Moore,* 613 F.2d 1029, 1043-45 (D.C. Cir. 1979); here we see none. Beyond that, as we have said before, we perceive no basis for invoking a rule of lenity in favor of defendants who have been proved to have conspired to take action condemned by 18 U.S.C. § 371 within the six year time limit provided by 26 U.S.C. § 6531(1) simply because they also have, or

have not, been proved to be guilty of conspiracy to violate other statutes to which a five year period of limitations applies.

We hold that in this case, where special verdicts were taken, the dual statute of limitations instruction was proper.

III. *Matthews' Notes*

Early in the trial the Government offered in evidence notes prepared by Southland's general counsel, Clark Matthews, which we quote in the margin.[3] This was the last of four yellow sheets found in a binder used by Southland's legal Department to collect information discovered during the BER. The first three pages are an outline entitled "BER-Final Report to Board"; the only reference in these pages to the Mastropieri matter was "NY-Mastropieri Div Mg Thought Payment Outside Usual Controls." The final BER report made no reference to the Mastropieri matter, although Matthews then knew the scheme involved a bribery. The Government urged that the quoted note represented Matthews' real understanding of what had gone on. Judge Sifton initially declined to allow the note to be admitted, on the ground that "the portions of these notes relied on by the government are so cryptic that it seems to be speculative to

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[3] NY Tax Comm-X
—300m
Since 10/11/72 50 pending sales tax term franchisees
contend fc sec int
10/76-5/77 paid 7/7/77
abt 200 stores
Kelly $107,757.92 phase out—take care of
(camera) for $40M to spread
among mems tax comm
(mtn & sec
film kit)
Mastropieri

attribute to these notes the meaning which the government argues they have" and that Matthews, the only witness who could explain the notes, intended to claim his Fifth Amendment privilege and would thus be unavailable. Upon urging by the Government, the court reexamined the issue but adhered to its decision. However, after Southland had completed its evidence and the last witness of the trial was on the stand, the judge announced that his views about the Matthews note had changed and admitted the entire exhibit. Southland objects that the note was speculative; that it was inadmissible hearsay; and that its admission violated the corporation's confrontation rights under the Sixth Amendment.

FRE 402 prescribes that, subject to certain exceptions not here material, "[a]ll relevant evidence is admissible," but FRE 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed" by certain dangers there outlined, a balancing which Judge Sifton here expressly resolved in favor of probative value. FRE 401 says that relevant evidence means:

> evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

As said in *Carter v. Hewitt,* 617 F.2d 961, 966 (3 Cir. 1980), the "standard of relevance established by the Federal Rules of Evidence is not high." Particular deference is properly accorded to a ruling of the trial judge with respect to relevancy. *See, e.g., United States v. Catalano,* 491 F.2d 268, 273 (2 Cir.), *cert. denied,* 419 U.S. 825 (1974); *United States v. Aulet,* 618 F.2d 182, 191 (2 Cir. 1980). He has a familiarity with the development of the evidence and the jury's reaction to it which an appellate court cannot equal. *See United States v. Robinson,* 560 F.2d 507, 514-15 (2 Cir. 1977) (en banc),

cert. denied, 435 U.S. 905 (1978). Hence courts of appeals have sustained rulings admitting evidence quite as equivocal as Matthews' notes, *see, e.g., Tug Raven v. Trexler,* 419 F.2d 536, 543 (4 Cir. 1959), *cert. denied,* 398 U.S. 938 (1970) (suicide by one member of crew of tug after fire admitted as possibly showing consciousness of guilt); *Carter v. Hewitt, supra,* 617 F.2d at 966 (letter by plaintiff encouraging filing of brutality complaints against prison guards admitted because it could be read as encouraging filing of false complaints of which plaintiff was one). We have also ruled that great deference must be given to the trial judge's weighing under Rule 403. *See United States v. Robinson, supra,* 560 F.2d at 514-15.

The reasonableness of concluding that the Matthews notes revealed his knowledge of the true nature of the Mastropieri transaction had become much greater at the end of the trial when the jury had learned that Matthews had interviewed DeFalco and had been told that Mastropieri had originally sought $40,000 to $50,000 in cash, that Matthews had also been approached to approve the payment of a $45,000 legal fee to Mastropieri in the form of a phony airplane lease, and that Matthews had been told by DeFalco not to interview Mastropieri because a bribe had already been paid. Judge Sifton's change in his ruling thus did not reflect capriciousness, as Southland's counsel suggests, but a reasoned reaction to changed circumstances.

Responding to the hearsay objection the Government asserts that the notes were admissible either because they were not hearsay, *see* Rules 801(d) (2) (D) (vicarious admissions), 801(c) (statement not offered to prove the truth of the matter asserted), 801(d) (2) (E) (statement by coconspirator during the course and in furtherance of the conspiracy), or under the exception in Rule 803(3) (statement of declarant's existing state of mind). Judge Sifton predicated admissibility on Rule 801(c). He directed the jury that "[t]he Matthews notes were . . . admitted

solely as bearing on their purported author's state of mind." Matthews' belief that a bribery had been planned was unquestionably relevant. If he knew that the Mastropieri transaction involved a bribe, this would tend to show that a number of his actions, and hence those of Southland, *see United States v. Dotterweich,* 320 U.S. 277, 281 (1943), *e.g.,* the failure to interview Pender, the withholding from the IRS of the Pender and Kitchen questionnaires, the perfunctory nature of the interview of Mastropieri and the report to the Audit Committee in regard to the same, the mockery of the discussion with outside tax counsel, the failure to disclose to the Audit Committee what Matthews thought was a $5000 payment on the bribe, were in furtherance of a conspiracy to obstruct the IRS in the performance of its functions.

When a declaration is admitted only to prove a relevant state of mind, it does not appear to matter, save perhaps as later indicated, whether admissibility is predicated on the declaration not being hearsay because it was not offered to prove the truth of the matter asserted, FRE 801(c), or under the hearsay exception for declaration of states of mind, FRE 803(3). Under either theory, "[a] state of mind can be proved circumstantially by statements . . . which are not intended to assert the truth of the fact being proved," *see* 4 Weinstein, Evidence Para. 803(3) [02], at 803-107 (1984). *See also Metzler v. United States,* 64 F.2d 203, 208 (9 Cir. 1933) (letter from private detective to district attorney that county sheriff appointed by him was accepting protection money admissible to show district attorney's knowledge); *United States v. De Carlo,* 458 F.2d 358, 363-64 (3 Cir.) (en banc), *cert. denied,* 409 U.S. 843 (1972); *United States v. Taglione,* 546 F.2d 194, 200-01 (5 Cir. 1977); *Mills v.*

Danson Oil Corp., 691 F.2d 715 (5 Cir. 1982). We thus reject appellants' hearsay argument.[4]

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[4] Although it is not necessary to decide the point, we would not wish to be understood as foreclosing the Government's argument that the Matthews notes were outside the hearsay rule, and thus admissible against Southland, under FRE 801(d) (2) (D) as "a statement by [an] agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship." The appellants contend that *Litton Systems, Inc. v. American Tel. & Tel. Co.*, 700 F.2d 785, 816-17 (2 Cir. 1983), *cert. denied*, 104 S. Ct. 984 (1984), requires that the author of the admission have personal knowledge, apparently meaning knowledge from non-hearsay sources. We do not read the *Litton* opinion as going so far. The material excluded in *Litton* was merely notes of employee interviews; the opinion describes them as containing "multiple levels of hearsay" and refers to the recorded material as "gossip," citing 4 Weinstein, Evidence Para. 801(d) (2), at 801-164 (1981). Here Matthews had obtained knowledge of the questionable nature of the Mastropieri fee in his capacity as general counsel before his assignment to the BER. Moreover, the *Litton* opinion does not cite the statement in the Advisory Committee's Notes:

> The freedom which admissions have enjoyed from . . . the restrictive influences of the opinion rule and the rule requiring firsthand knowledge, when taken with the apparently prevalent satisfaction with the results, call for generous treatment of this avenue of admissibility.

FRE 801(d) (2) (D) advisory committee note. The only case cited in *Litton* on this point, *Northern Oil Co. v. Socony Mobil Oil Co.*, 347 F.2d 81, 83 (2 Cir. 1965), antedates the Rules, and the Third Circuit has thought it to be "clear from the Advisory Committee Notes that the drafters intended that the personal knowledge foundation requirement of Rule 602 should apply to hearsay statements admissible as exceptions under Rules 803 and 804 but not to admissions (including coconspirator statements) admissible under Rule 801(d) (2)." *United States v. Ammar*, 714 F.2d 238, 254, *cert. denied*, 104 S. Ct. 344 (1983) (footnote omitted). The Seventh and Eighth Circuits agree; *see Mahlandt v. Wild Canid Survival & Research Center*, 588 F.2d 626 (8 Cir. 1978); *MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1143 (7 Cir.), *cert. denied*, 104 S. Ct. 234 (1983). Reconciliation of Rule 801(d) (2) (D) and Rule 602 should await a case where this is essential.

We come finally to appellants' objection based on the Confrontation Clause. *See California v. Green,* 399 U.S. 149 (1970); *Dutton v. Evans,* 400 U.S. 74 (1970); *Ohio v. Roberts,* 448 U.S. 56 (1980). It is not at all clear that the constitutional impediment against the receipt of extra-judicial declarations, whether within or, as in *Dutton,* without recognized exceptions to the hearsay rule, applies to a declaration which is not being used as proof of the fact stated, *see Dutton v. Evans, supra,* 400 U.S. at 88 (plurality opinion). The contention likewise seems hardly appropriate when voiced by Southland, since the witness it wishes to confront is, in the eyes of the law, itself. *United States v. Dotterweich, supra,* 320 U.S. at 281. However, assuming that both defendants are entitled to raise objection under the Confrontation Clause, we think Matthews' notes had sufficient assurances of reliability, particularly when they were received only as proof of his belief that a bribery had been planned. *Dutton v. Evans, supra,* 400 U.S. at 88-89. Matthews had no motive to make unfair accusations against anyone; to the contrary, his own involvement in the Mastropieri scheme and his concealment of facts from the Audit Committee gave him every inducement not to memorialize his beliefs unless he thought them true. Indeed the notes were later used as a basis for prosecuting Matthews for conspiracy to defraud the Government. *United States v. Matthews,* No. Cr. 84-00461 (E.D.N.Y. 1985). Matthews' contact with the Mastropieri matter both as it transpired and in the course of the BER gave him considerable firsthand knowledge of the planned bribe. DeFalco's testimony, which was subject to cross-examination, corroborated Matthews' notes in many respects. *Cf. United States v. Wright,* 588 F.2d 31, 38 (2 Cir. 1978), *cert. denied,* 440 U.S. 917 (1979). Furthermore the notes were neither "crucial" to the Government's case nor "devastating" to the defense. *See Dutton v. Evans, supra,* 400 U.S. at 87. They dealt primarily with the bribery objective; the jury reached no verdict on this as respects Southland and the

other evidence with respect to Mastropieri was overwhelming, at least unless the jury must be supposed to have been so gullible as not to understand what was meant by "heavy entertaining."

IV. *The Exclusion of a Portion of Mastropieri's Grand Jury Testimony, and herein of the Sealing of the Indictment*

After having brought out the fact of Mastropieri's receipt of IRS Form 1099 in relation to the legal bill for $96,500, the Government introduced an excerpt from his grand jury testimony reading as follows:

> Q: As a result of receiving this [form] 1099, Grand Jury Exhibit 18, did you know that the Southland Corporation was reporting the fact that you had received a fee of $96,500?
>
> A. Yes.

However, the court refused to allow Mastropieri to introduce testimony immediately following this. After admitting his realization that Southland would be deducting the $96,500 as a legal fee, Mastropieri said that he had called DeFalco and complained about Southland's reporting the $96,500 as income to him when it knew that he had not actually received any funds. According to Mastropieri, DeFalco said that he would "take care of the matter" and that Mastropieri shouldn't worry about it. Mastropieri said he was not going to report "one cent of this $96,500" and thought DeFalco had said it was a mistake — "I should not have gotten this thing." Mastropieri contends that this testimony might have led the jury to conclude that he had taken steps which he could have expected would lead Southland not to have taken the deduction, thereby negating any intent on his part to defraud the Government.

FRE 106 provides that:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

We have interpreted this rule "to require that a statement must be admitted in its entirety when this is necessary to explain the admitted portion, to place it in context, or to avoid misleading the trier of fact . . . or to ensure a 'fair and impartial understanding' of the admitted portion." *United States v. Marin*, 669 F.2d 73, 84 (2 Cir. 1982). This is a principle of simple fairness, long antedating the Federal Rules of Evidence, *see United States v. Stone*, 282 F.2d 547, 551-52 (2 Cir.), *cert. denied*, 364 U.S. 828 (1960) (also involving refusal to admit a portion of a defendant's grand jury testimony). The district judge was in error in relying on *Marin* as a basis for exclusion; there the excluded portion related to a subject that had been excised from the statement that was admitted and that was "neither explanatory of nor relevant to the admitted passages", *see also* 669 F.2d at 85 n.6. There is nothing in the Government's point that a part of the excluded testimony was favorable to it; Mastropieri still may rightfully complain of the exclusion of the parts that were not.

This, however, does not lead us to reverse the appellants' convictions. Excluding these portions of Mastropieri's grand jury testimony had no effect upon Southland. Even as to Mastropieri, the excluded portion of the testimony bore only on the fraud objective; it had no probative effect with respect to Mastropieri's guilt for conspiracy to violate the Travel Act. Were it not for a question concerning the running of the statute of limitations on the Travel Act objective discussed below, this

would end the matter as Mastropieri's conviction could be upheld so long as he agreed to accomplish at least one of the criminal objectives charged. *United States v. Papadakis*, 510 F.2d 287, 297 (2 Cir. 1975). Despite the limitations question, we still rule in the Government's favor since although the limitations point is of first impression in this court, we think the Government is correct. We therefore need not consider the Government's alternative argument that the exclusion of portions of Mastropieri's grand jury testimony was harmless error even in respect of the fraud charge.

The statute of limitations point is this: Mastropieri claims, and the Government does not dispute, that the last overt act charged against him in the bribery part of the conspiracy occurred on March 27, 1978. The predecessor of the instant indictment was returned by the grand jury on March 25, 1983. However, the Government obtained an order sealing the indictment; the basis for this was that announcement of the indictment would make it more difficult for the Government to obtain complete and truthful testimony from Frank Kitchen, a vice president of Southland who had been granted immunity, *see Matter of Kitchen*, 706 F.2d 1266 (2 Cir. 1983). After this court's decision on April 27, 1983 made it evident to the Government that no purpose would be served by recalling Kitchen before the grand jury, the indictment was unsealed on May 5, 1983. Judge Sifton found that the sealing, for a period of six weeks, lasted no longer than was necessary to accommodate legitimate prosecutorial interests. Mastropieri contends that there was no legal basis for the ruling and that May 5, 1983 must be taken as the date of the return of the indictment, thus barring prosecution for conspiracy to violate the Travel Act. He relies on two reasons. One is that under F.R. Cr. P. 6(e)(4) an indictment may be sealed only to assist in achieving custody of the defendant; the other is that if sealing is permitted for any other purpose, there was no proper purpose here.

Under both 18 U.S.C. § 3282 and 26 U.S.C. § 6531, the indictment must be "found" within the statutory periods. Read literally this does not require that the indictment must be made public. However, F.R. Crim. P. 6(e) (4) provides:

> Sealed Indictments. The federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

Mastropieri insists that no reason except the one mentioned in the Rule can justify the sealing of an indictment.

There is a surprising dearth of authority upon the subject. In *United States v. Michael,* 180 F.2d 55, 57 (3 Cir. 1949), *cert. denied. sub nom. United States v. Knight,* 339 U.S. 978 (1950), decided only three years after the Criminal Rules were adopted, the court stated in an opinion by Judge Maris:

> Criminal Procedure Rule 6(e) authorizes indictments to be kept secret during the time required to take the defendant into custody. If such secrecy may lawfully be imposed in that situation we see nothing unlawful in the court imposing secrecy in other circumstances which in the exercise of a sound discretion it finds call for such action.

(footnote omitted). The court would scarcely have said that if the taking of custody had been the sole objective.[5]

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[5] Examination of the briefs in the Third Circuit tend to confirm this. While, in their statements of fact, the parties merely note the sealing of the indictment without providing relevant details, the appellants stated in a Supplemental Brief on Reargument:

(Footnote continued on following page)

The notes of the Advisory Committee written when Rule 6(e) was adopted in 1946 say cryptically that "[t]he . . . sentence authorizing the court to seal indictments continues present practice." Such evidence as we have found suggests that the practice at the time the Rule was written allowed courts to seal indictments for reasons other than obtaining custody of the defendants. A treatise of the period, which described itself as focusing on "what is and not what has been or should be," reflects this in its statement that "[*w*]*here the public interest requires it, or for other sufficient reason,* the court may order an indictment to be sealed." Housel & Walser, *Defending and Prosecuting Federal Criminal Cases* § 230, at 300 (2d ed. 1946) (emphasis supplied). *Accord* 1 Matthews, *How to Try a Federal Criminal Case* § 215, at 318-19 (1960). At a symposium on the new Rules of Criminal Procedure sponsored by the New York University School of Law in collaboration with the American Bar Association, the New York State Bar Association and the Federal Bar Association, George Medalie — Associate Judge of the New York Court of Appeals, former United States Attorney for the Southern District of New York, and member of the Supreme Court Advisory Committee on the Criminal Rules — stated before a

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(footnote continued fro preceding page)

> The docket entry discloses no reason for the impoundment [of the indictment]. One thing, however, is certain. It was not for the purpose of facilitating the apprehension of the accused . . . Why the indictment was thus arbitrarily and indefinitely impounded must remain a matter of conjecture.

This statement that custody could not have been the purpose for the sealing is further supported by the fact that the defendants were reputable members of the Pittsburg business community and do not appear to have been the type of individuals who would have gone "underground" to evade capture by the authorities; when the presiding judge unsealed the indictment, he refused the United States Attorney's request that bench warrants be issued for the defendants and directed that the accused be notified by letter or telephone to appear for arraignment.

panel chaired by Judge Learned Hand, that Rule 6 contained:

> the usual provision for the sealing of the indictment, where the district attorney or the attorney general is of the opinion that the indictment having been procured, *for sound reasons of policy,* nothing should be done for a while, no publication made of the fact. That, of course, is present practice.

VI *Proceedings of the New York University Law School Institute on the Federal Rules of Criminal Procedure* 155 (1946) (emphasis supplied). Further support for this view comes from comments received by the Supreme Court's Advisory Committee after circulation of its initial draft of the Rules.[6] For example, one attorney wrote the Committee to complain about "the increasing practice of using sealed indictments where it was unnecessary." 1 Orfield, *Criminal Procedure Under the Federal Rules* § 6:2, at 348 (1966). Another attorney proposed that the Rules contain "a provision prohibiting secret or sealed indictments as to defendants already subject to the jurisdiction of the court." *Id.*

If, as we are therefore confident, the practice before adoption of the Rule permitted the sealing of indictments for reasons other than obtaining custody, we do not believe the intention was to restrict it. The Federal Rules of Criminal Procedure were not intended to be exhaustive. As a member of the Supreme Court Advisory Committee

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[6] The preliminary draft of Rule 6 of Federal Criminal Procedure provided that:

> The court may direct that the indictment shall be kept secret until the defendant is in custody or has given bail and the clerk shall seal the indictment and in that event no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

Except for minor stylistic revisions, this language is identical to that in the Rule which was eventually adopted.

stated at the time, "many now accepted practices and judicial powers are omitted from the proposed Rules without intent that the omission shall be considered by implication a repeal thereof." Waite, *The Proposed Federal Rules of Criminal Procedure*, 27 J. Am. Jur. Soc. 101 (1943). If the Rule were read literally, a defendant who was subject to arrest on the return of the indictment could object to a sealing to facilitate the arrest of co-defendants; yet the Rule has never been read that way. *See United States v. Watson*, 599 F.2d 1149, 1155 (2 Cir. 1979), *rev'd on other grounds sub nom. United States v. Muse*, 633 F.2d 1041 (2 Cir. 1980) (en banc), *cert. denied*, 450 U.S. 984 (1981). The limiting effect of the Rule was to place sealing in the hands of a judicial officer rather than as theretofore in those of a prosecutor. 1 Orfield, *Criminal Procedure Under the Federal Rules, supra*, § 6:1, at 341. In sum, we see no reason for disagreeing with the *Michael* decision, rendered only three years after adoption of the Rule, a time when the intention of the framers was far better known that it now can be.

The question remains whether the prosecutorial objectives here sought to be obtained justified the sealing of the indictment. This is a point on which great deference should be accorded to the discretion of the magistrate, at least in the absence of any evidence of substantial prejudice to the defendant. The Government should be able, except in the most extraordinary cases, to rely on that decision rather than risk dismissal of an indictment, the sealing of which it might have been willing to forego, because an appellate court sees things differently, after the expenditure of vast resources at a trial and at a time when reindictment is by hypothesis impossible. Mastropieri has not even asserted prejudice from the sealing of the indictment for 39 days after the statute had run. Obviously he had been on notice of the likelihood of indictment and could have begun his preparation for trial long before the end of the statutory period, *see United States v. Watson, supra*, 599 F.2d at 1154.

V. *Mastropieri's Argument that the Government Forfeited its Right to Prosecute by Failing to Indict him on or before September 30, 1982*

An argument which can be dealt with much more swiftly is one made by Mastropieri that the Government forfeited its right to prosecute him by an agreement made on July 22, 1982. This reads in pertinent part:

> Eugene Mastropieri hereby waives and shall not assert the defense that any prosecution for any crime incident to the retention by and representation of the Southland Corporation by Eugene Mastropieri is barred by the statute of limitations, provided that any such prosecution shall be brought on or before September 30, 1982.

The background of the agreement was this: The Government feared in the summer of 1982 that it might be having limitations problems with respect to Mastropieri[7] but the latter wished to appear before the grand jury to present his side of the case. The Government was willing to accommodate him provided he would waive any statute of limitations defense if an indictment was brought on or before September 30, 1982. When it became clear that the grand jury would not finish its deliberations by that date, the Government sought a further waiver which Mastropieri declined to give.

After the indictment returned on March 25, 1983, was unsealed, Mastropieri moved to dismiss it on the basis of his waiver. The district judge denied this, saying that "the defendant is not so clearly right in his argument . . . that the issue can be decided on a motion to

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[7] The Government had similar concerns as regards Southland, and the corporation executed an identically worded waiver on the same date as Mastropieri. At the Government's request, Southland subsequently extended its waiver through May 5, 1983, the date of the expiration of the term of the grand jury investigating the matter.

dismiss." Characterizing this as a "factual finding of ambiguity by the trial court, and citing numerous inapposite decisions, Mastropieri asks that we dismiss the indictment because the Government breached a promise to indict him on or before September 30, 1982, if at all.

We see no force whatever in this argument. Mastropieri made a limited waiver of the statute of limitations; the Government did not promise anything. It is not asserting that Mastropieri has waived his right to contend that the indictment was found too late. He makes no contention that the indictment was not timely "found". Although Mastropieri argues that it would have been untimely if we should determine that the date of unsealing rather than the date of finding controls, the Government, while disputing the argument, does not challenge his right to make it. Judge Sifton made no "finding" that the agreement meant what Mastropieri said. No legal consequences arise from his having denied Mastropieri's motion on the ground that Mastropieri was not clearly right rather than, as we would have done, on the ground that he was clearly wrong.

VI. *Refusal to Charge a Violation of 26 U.S.C. § 7207 as a Lesser Included Offense*

Section 7207 of the IRC provides:

> Any person who willfully delivers or discloses to the Secretary any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $10,000 ($50,000 in the case of a corporation), or imprisoned not more than 1 year, or both.

This crime being a misdemeanor, under 18 U.S.C. § 371 conspiracy to commit it likewise is a misdemeanor. The judge denied defendants' requests to charge that if the

jury did not find that they had committed the felony of conspiring to defraud the United States by impeding the functioning of the IRS, it might nevertheless find that defendants conspired to violate § 7207.

We have held that a defendant is entitled to a lesser included offense instruction if:

> (1) all of the elements of the lesser offense (§ 7207) were also elements of the greater offense (§ 371), *see United States v. Giampino,* 680 F.2d 898 (2 Cir. 1982), and,
>
> (2) the greater offense has one additional element not found in the lesser offense that the jury would be justified in finding the government had failed to prove beyond a reasonable doubt. *United States v. Garcia-Duarte,* 718 F.2d 42 (2 Cir. 1983).

There is no dispute that the first condition was met; the elements of a conspiracy to file a return known to the maker to be fraudulent or false as to any material matter (§ 7207) would also constitute elements of a conspiracy to defraud the United States by impeding the functioning of the IRS. The debated question relates to the second condition, which the Government contends was absent.

The Court said in *Sansone v. United States,* 380 U.S. 343, 350 (1965):

> A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense.

In *Keeble v. United States,* 412 U.S. 203, 208 (1973), the Court phrased the test as being whether "the evidence would permit a jury rationally to find [the defendant] guilty of the lesser offense and acquit him of the greater." *See also United States v. Markis,* 352 F.2d 860, 865-67 (2 Cir. 1965), *vacated on other grounds,* 387 U.S. 425 (1967).

We fail to see what this additional element would be. Once the jury decided that Southland had filed a return taking a deduction for legal expenses which it knew had not been incurred, as the jury would have had to do in order to find a violation of 26 U.S.C. § 7207, it would have decided every element necessary to convict Southland of defrauding the United States under 18 U.S.C. § 371. This is particularly clear in light of *United States v. Bishop,* 412 U.S. 346 (1973), which held that § 7207 requires proof of the same degree of *scienter* as criminal tax felony statutes using the adverb "willfully", and consequently reversed the Court of Appeals for the Ninth Circuit which had reversed a district court for refusing to give lesser included offense instructions in a case where the defendant had been charged with violating 26 U.S.C. § 7206. If, as held in *Bishop,* 412 U.S. at 360-61, a conviction of defendants for violating § 7207 would have required proof of "bad purpose or evil motive" in the sense described in *United States v. Murdock,* 290 U.S. 389, 394-95 (1933), no more is needed to establish the "intent to defraud" required by § 371.

Defendants argue that the jury could have found that they agreed purposefully to file a false tax return in violation of § 7207, without finding that they intended to defraud the United States of revenue. Even if such a finding by the jury were possible, it is of no aid to the defendants. The Government need not prove that the defendants intended to defraud the United States of revenue to establish a violation of § 371. Conspiracy to defraud the United States includes attempts to "interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation . . . ." *Hammerschmidt v. United States,* 265 U.S. 182, 188 (1924).

Accordingly, once the jury determined that the defendants violated § 7207 by deliberately filing a false tax return, it would also have decided that they conspired in violation of § 371 to defraud the United States by interfering with the lawful function of the IRS in ascertaining Southland's legitimate tax deductions.

Defendants argue that the indictment charged not broadly that they conspired to defraud the United States, which is all that the statute requires, but that they agreed that the defrauding should be accomplished "by impeding, obstructing and defeating the lawful functions of the Internal Revenue Service of the Treasury Department of the United States in the ascertainment, computation, assessment and collection of income taxes, to wit: by conducting their business affairs and financial transactions in a manner which would prevent the Internal Revenue Service from ascertaining the true and correct nature of business expense deductions . . . ." But the means by which defendants did this was the filing of a return which took a $96,500 deduction for legal fees to which the defendants knew the corporation was not entitled. This is precisely what the Government would have to prove to establish a conspiracy to violate § 7207. We see nothing to the contrary in *United States v. Tarnopol*, 561 F.2d 466 (3 Cir. 1977), on which Southland heavily relies. The case had nothing to do with failure to charge a lesser included offense; the reversal there was because of the judge's having submitted a conspiracy count with an instruction that the jury could bring in a guilty verdict if it found that defendants had acted in pursuit of any of three objectives when there was insufficient evidence with respect to one, namely, a conspiracy to defraud the United States under § 371. 561 F.2d at 474.

The judgments of conviction are affirmed.

Appendix B
Decision of United States District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

THE SOUTHLAND CORPORATION *et alia*,
Defendants.

CR-83-126
198
389
515

MEMORANDUM AND ORDER

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Appendix B
Decision of United States District Court

SIFTON, District Judge.

Defendants, S. Richmond Dole; his employer, The Southland Corporation;[1] and Eugene Mastropieri, a former New York City Councilman, were indicted on November 17, 1983, pursuant to 18 U.S.C. § 371 for conspiracy to violate the Travel Act, 18 U.S.C. § 1952, and to defraud the United States. With respect to the first object of the conspiracy, violation of the Travel Act, the indictment alleges that it was an object of the conspiracy to bribe a member of the New York State Tax Commission in return for Southland's receiving favorable tax treatment in connection with Southland's sales tax liability to the State of New York.[2] The indictment charges with respect to the second object of the conspiracy that the defendants agreed to defraud the United States by obstructing the lawful functions of the Internal Revenue Service in the collection of taxes.[3] In addition to

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[1] Dole is a vice-president of Southland.

[2] The indictment states:

> "(a) The defendants THE SOUTHLAND CORPORATION, S. RICHMOND DOLE, and EUGENE MASTROPIERI did conspire and agree together and with others to travel in foreign and interstate commerce and use facilities in interstate commerce, including the mail, with intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of unlawful activity, said unlawful activity being bribery in violation of Article 200 of the Penal Law of the State of New York, and to thereafter perform and attempt to perform acts to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of said unlawful activity."

Indictment, Count One, Para. 1(a).

[3] The indictment further states that the defendants conspired to defraud the United States:

> "'(b) . . . by impeding, obstructing and defeating the lawful functions of the Internal Revenue Service of the Treasury Department of the United States in the ascertainment, computation, assessment and collection of income taxes, to wit: by

(footnote continued on following page)

these charges, defendant Mastropieri has been indicted on two counts of mail fraud and one count of wire fraud in connection with the alleged bribery scheme. These indictments were consolidated for trial by decision of this Court dated December 20, 1983.

The matter is now before the Court on pre-trial motions by the defendants as set forth below.

1. *Motions to Dismiss on Statute of Limitations Grounds.* Each of the defendants seeks to dismiss some or all of the charges against them on the grounds that their prosecution is barred by the applicable statutes of limitations. Defendant Mastropieri argues that the mail fraud charge against him was improperly sealed and was unsealed after the statute of limitations had run. Defendants Southland and Dole argue that the only overt act alleged to have been committed by them pursuant to the conspiracy with which they are charged within the applicable limitations period is, in fact, an act of concealment occurring after the conspiracy was over. For the reasons that follow, both of these contentions must, at this point, be rejected.

Mastropieri. The Government alleges without contradiction that it timely filed the mail fraud indictment against Mastropieri and obtained from a United States Magistrate leave to seal it because the Government was concerned that disclosure of the fact of filing of the indictment as well as its particularized allegations concerning Mastropieri's activities would impede its then

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(Footnote continued from preceding page)

> conducting their business affairs and financial transactions in a manner which would prevent the Internal Revenue Service from determining the true and correct nature of business expense deductions of the defendant THE SOUTHLAND CORPORATION."

Indictment, Count One, Para. 1(b).

current efforts to obtain complete and truthful testimony from another witness as part of its on-going grand jury investigation. It is also not disputed that, immediately following the prosecutor's determination that further testimony could not be obtained from the witness subject to the on-going grand jury investigation and within two months of the original filing, the indictment was unsealed and the defendant Mastropieri arraigned. Defendant Mastropieri does not contend that he has suffered any prejudice as a result of the two-month period during which the indictment was under seal.

Under these circumstances dismissal of the mail fraud charge against Mastropieri is not warranted. The sealing of the indictment furthered legitimate prosecutorial interests. *United States v. Watson,* 599 F.2d 1149, 1154 (2d Cir. 1979), *modified sub nom. United States v. Muse,* 633 F.2d 1041 (2d Cir. 1980) (*en banc*), *cert. denied,* 450 U.S. 984 (1981). The sealing lasted no longer than necessary to accommodate them. *Id.* No showing of actual prejudice has been made requiring justification of the sealing of the indictment in terms of strong prosecutorial interests. *Id.* at 1154. The indictment was thus timely filed under the applicable statute of limitations.

Southland and Dole. The argument of Southland and Dole to the effect that the conspiracy charge against them was untimely filed hinges on a view that the conspiracy had terminated well before November 1980, when the last overt act occurred which would have permitted the charge to have been timely filed against them. Accordingly, defendants argue that, under *Grunewald v. United States,* 353 U.S. 391 (1957), the alleged act of concealment set forth in this overt act was not in furtherance of the conspiracy and cannot be relied on to establish the timeliness of the indictment which is, accordingly, time barred.

Defendants' argument must be rejected at least at this stage of the proceedings since it turns on an interpre-

tation of the nature of the conspiratorial agreement and of its duration which cannot be accepted simply on the face of the indictment even when amplified by the parties' pretrial submissions on these motions. The grand jury testimony relied on by the defendants hardly establishes as a matter of law and beyond dispute that all members of the conspiracy regarded its purposes as incapable of accomplishment and the conspiracy terminated at the time in November 1980 when it is said by the grand jury that acts of concealment occurred to further its objectives. According to the Government, these acts of concealment were not designed to prevent discovery of the existence of a terminated conspiracy to prevent defendants' prosecution for that crime, but rather to permit the conspiracy to move forward to secure the fruits of the conspiracy not yet obtained. Whether defendants or the Government will prevail in establishing that their version of the case is correct cannot be determined on the face of the indictment or even on the undisputed facts concerning the conspiracy's course as set forth in the grand jury testimony relied upon. Accordingly, the motions of Dole and Southland to dismiss the indictment on statute of limitations grounds must be denied without prejudice to their renewal after the Government has presented its evidence at trial as to the scope of the agreement and its continued viability in November 1980.

2. *Motions to Dismiss for Prosecutorial Misconduct.* Defendants Southland and Dole each seek dismissal of the conspiracy charge against them on the grounds that the decision to charge them with a conspiracy having tax fraud as one of its objectives constituted an abuse of prosecutorial discretion and that various exculpatory items of proof were not presented to the grand jury that returned the indictment. The motions must likewise be denied.

While defendants characterize the charge that they entered into a conspiracy to defraud the United States of taxes as simply a product of the prosecutor's imagination which will not withstand the careful scrutiny required by *United States v. Rosenblatt*, 554 F.2d 36, 40 (2d Cir. 1977), the factual basis for the charge as revealed in the grand jury testimony disclosed in discovery appears quite substantial. The theory of fraud on the Government relied on by the Government is hardly amorphous or difficult to understand, having its foundation in the tax laws, and the evidence to support it concrete and easily comprehended. The suggestion that the alleged co-conspirators did not, in fact, have tax objectives in mind in proceeding as they did cannot be determined in advance of trial.

Defendants' complaint that the Government failed to present the grand jury with evidence of an explicit or formal agreement to defraud the Government of taxes ignores the elementary principles of conspiracy law that such formal or explicit agreement need not be shown in order to establish a conspiracy. The elaboration of this argument in defendants' papers to the effect that the Government failed to instruct the grand jurors on defendants' statute of limitations defense and withheld exculpatory evidence since the absence of an express agreement was not pointed out to the grand jurors must likewise be rejected because it mistakes the Government's obligations with regard to the presentation of a defendant's case to the grand jury. *See United States v. Ciambrone*, 601 F.2d 616, 622-23 (2d Cir. 1979). Defendants have failed to establish the existence of some of the favorable evidence that they say was withheld from the grand jury, *e.g.*, a denial by DeFalco that he entered into a conspiracy to create a spurious tax deduction and the disclosure to the IRS of Business Ethics Review Questionnaire responses revealing the deduction before the filing of the tax return in which the deduction was taken.

Other evidence or information allegedly withheld was either in fact presented to the grand jury or is not so clearly exculpatory as to warrant dismissal of the indictment because it was not.[4]

Motions for Severance. Although two of the three defendants renew applications for severance previously made and Dole joins in them, none has established such a level of antagonism and inconsistency between the defenses each intends to present as would warrant a severance in the circumstances here presented. Nor has any showing been made that under an order of immunity or otherwise defendant Mastropieri would support the position of Southland and Dole as to his role in the matter at a separate trial. Defendants' arguments with regard to potential *Bruton* problems and risks of jury confusion have previously been argued and rejected by this Court, and no new reasons have been advanced for departing from the undersigned's earlier determination on the issue. Accordingly, defendants' motions seeking severance are denied.

Motions for Dismissal or for Change of Venue. The motions of Southland and Dole to dismiss for lack of venue must be denied since there seems no basis for rejecting the Government's contention at this stage of the proceedings that a number of overt acts in furtherance of both objectives of the conspiracy occurred in the

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[4] Defendant Dole's motion to dismiss the indictment for failure to present his version of the facts to the grand jury is of a piece with his motion to dismiss paragraph 7(a) of the indictment, which alleges that Mastropieri performed no substantial legal services for Southland, because evidence was presented to the grand jury from which it could have found that he did perform some legal work for the company. Just as it is not the prosecutor's obligation to present a defendant's version of the facts to a grand jury where that version is not clearly exculpatory, it is not the grand jury' s obligation to draw all inferences from the facts that are presented to it favorable to an accused. *See United States v. Ciambrone, supra.*

Eastern District of New York. Nor does a transfer of venue to the Northern District of Texas of the charges against Southland and/or Dole appear warranted. The allegations at issue involve efforts to bribe New York State officials and the use of a New York lawyer's legal bill to defraud the United States in connection with the deductibility of the bribe pursuant to conspiratorial meetings in and about the New York area. One of the three defendants is a New York resident and does not seek a transfer, thus necessitating two trials if a transfer is ordered. Neither the substance of the testimony of witnesses nor the contents of exhibits located in Texas has been identified by the moving parties. The disruption to the business of a national corporation from having one of its officers defend himself in the New York area rather than in Texas has not been described with any particularity. Counsel for all parties are either located in New York or closer to New York than to Texas. The docket conditions of the courts involved are not perceptibly different. To the extent that defendant Dole has any time to attend to corporate matters during the time his presence is required at trial in this District, there is no reason to think that he cannot tend to such matters in the company's New York offices as well as in the company's offices in Texas. *See United States v. Valle,* 16 F.R.D. 519, 522 (S.D.N.Y. 1955). Finally, the possibility that personal acquaintance with the defendants on the part of the jurors will make jury selection difficult is at least as great in Texas as it is in New York.

Discovery. Defendant Dole seeks a variety of information from the Government either pursuant to its obligations under *Brady v. Maryland* or in the form of a bill of particulars. The information sought pursuant to Rule 7 of the Federal Rules of Criminal Procedure in order to particularize the indictment's allegations is hardly required in order to give Dole sufficiently precise information as to what he is charged with so as to enable

him to defend himself, avoid surprise, and establish a double jeopardy defense if prosecuted again for the same offense.

The Government has responded to most of Dole's *Brady* requests. It is, however, directed to advise Dole of any materially inconsistent statements by Government witnesses, kickback arrangements involving DeFalco and other Southland attorneys, or prior similar acts it intends to prove against Dole at least three weeks prior to the date of trial.

The clerk is directed to mail a copy of the within to all parties.

SO ORDERED.

Dated: Brooklyn, New York
February 14, 1984

/s/ _____
United States District Judge